Supreme Court, U.S.
FILED

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No. 031379

In The

Supreme Court of the United States

IN RE BEN W. ALLUSTIARTE
and LINDA M. ALLUSTIARTE

**On Petition For Writ Of Mandamus
To The United States Bankruptcy Court
For The Eastern District Of California
(Sacramento Division)**

PETITION FOR WRIT OF MANDAMUS

WILLIAM T. BARRANTE
P.O. Box 273, Watertown, CT 06795
(860) 379-9885

Attorney For Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The petitioners filed a claim against the United States in the United States Court of Federal Claims alleging that certain decisions of a bankruptcy trustee and the Bankruptcy Court for the Eastern District of California (Sacramento Division) amounted to takings of their property without just compensation in violation of the Fifth Amendment to the United States Constitution.

The Court of Federal Claims dismissed the action for lack of jurisdiction. *Allustiarte v. United States*, 46 Fed.Cl. 713 (2001). The Court of Appeals for the Federal Circuit affirmed. *Allustiarte v. United States*, 256 F.3d 1349 (Fed.Cir. 2001).

The question presented here is:

If the Court of Federal Claims does not have jurisdiction to hear a takings claim arising out of a bankruptcy case, and such jurisdiction lies only in the bankruptcy courts and the courts in the bankruptcy appellate system (Bankruptcy Appellate Panel, Court of Appeals for the Ninth Circuit), should the Bankruptcy Court for the Eastern District of California (Sacramento Division), where the petitioners' cases were filed, be ordered to make the United States of America a party to the petitioners' bankruptcy cases so that the Bankruptcy Court and the courts in the bankruptcy appellate system could hear a takings claim and, if finding for the petitioners, render a judgment of compensation against the United States Government?

CORPORATE DISCLOSURE

The petitioners are individuals and have no interest in any corporation that is involved in their bankruptcy cases.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit that gives rise to this petition is published in 256 F.3d 1349 (Fed. Cir. 2001) [Appendix A]. The opinion of the United States Court of Federal Claims that was appealed to the Federal Circuit Court of Appeals is published in 46 Fed. Cl. 713 (2000) [Appendix B].

JURISDICTION

On July 16, 2001, the United States Court of Appeals for the Federal Circuit affirmed the dismissal of the petitioners' claims by the United States Court of Federal Claims.

The jurisdiction of this Court is invoked pursuant to Supreme Court Rule 20.3 and 28 U.S.C., Section 1651(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

(1) United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The petitioners, Ben W. Allustiarte and Linda M. Allustiarte, both of Modesto, California, pray that a writ of mandamus issue to the United States Bankruptcy Court for the Eastern District of California (Sacramento Division), in their bankruptcy cases, *In re Ben W. Allustiarte*, Case No. BK-79-3763-A-XII, and *In re Linda M. Allustiarte*, Case No. BK-79-3764-A-XII, to make the United States of America a party in each case, so that the Bankruptcy Court, and the courts in the bankruptcy appellate system, may consider petitioners' takings claims in each case, and if the court should find for the petitioners, may render a judgment of just compensation against the Government under the takings clause of the Fifth Amendment to the United States Constitution.

Petitioners in 1979 filed for an arrangement as farmers under Chapter XII of the Bankruptcy Act of 1898 in the United States District Court for the Eastern District of California, Sacramento Division. In their cases the bankruptcy trustee, with the approval of the Bankruptcy Court, sold certain of petitioners' real estate at values much below the fair market value, resulting in losses to the petitioners of several million dollars.

Neither the Bankruptcy Court nor any court in the bankruptcy appellate system was able to make a just compensation award against the United States, which was not a party in petitioners' cases. The petitioners filed a claim in the United States Court of Federal Claims,

alleging that the losses of their property as the result of authorized bankruptcy court rulings constituted takings by the Government without just compensation, in violation of the takings clause of the Fifth Amendment to the United States Constitution. In that court they alleged that the public benefit was the efficient administration of the bankruptcy system. The Court of Federal Claims dismissed the case on the ground that it did not have the jurisdiction to review the discretionary decisions of bankruptcy judges, 46 Fed.Cl. at 718 [App. 19-20]. An appeal was taken to the Federal Circuit, which affirmed. 256 F.3d 1349 (Fed. Cir. 2001) [Appendix A].

The petitioners' claim in this petition is that if the only court that has jurisdiction over their takings claims is the Bankruptcy Court, then that court could entertain their claims only if the United States Government is a party to the cases, inasmuch as just compensation under the Fifth Amendment can be secured only from the Government.

REASONS FOR GRANTING THE WRIT

I. If the Court of Federal Claims does not have jurisdiction to hear takings claims arising out of bankruptcy, the only way petitioners could have these claims heard in the Bankruptcy Court is to have the United States of America made a party to their bankruptcy cases.

As the basis for upholding the decision of the Federal Court of Claims, the Federal Circuit said that the Court of Federal Claims "does not have jurisdiction to review the decisions of district courts," 256 F.3d at 1352 [App. 4],

citing *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994), and that the proper way to get review of a bankruptcy court decision is appealing it to the federal district court and then to the Court of Appeals, 256 F.3d at 1353 [App. 4-5], citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995).

The petitioners, however, were not seeking review of the bankruptcy court decisions. They brought their claims to the Court of Federal Claims as an independent action seeking just compensation for takings under the Fifth Amendment, pursuant to the jurisdiction of the Court of Federal Claims under 28 U.S.C. Section 1491(a)(1). To support this, the petitioners cited *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), in which plaintiffs were permitted to bring a takings claim against the Government after having lost a challenge to the Interstate Commerce Commission's denial of a certificate of abandonment of a railway right-of-way. (They did not prevail on the merits of their takings claim, but the court had jurisdiction to hear it.) In the *Allustiarte* case, the Federal Circuit ruled that *Preseault* did not apply to the petitioners' situation and that only the courts in the bankruptcy court system could address their claims. The United States Supreme Court denied petitioners' petition for certiorari. 534 U.S. 1042 (2001).

Thus, petitioners' takings claims must be heard in their respective bankruptcy cases in the Bankruptcy Court for the Eastern District of California (Sacramento Division). But the Bankruptcy Court, if it found for the petitioners, could not grant them an award of just compensation if the United States Government is not a party to the case. The Government has the right to defend against petitioners' claims on the merits as it did in the

claims court with respect to jurisdiction. And if the petitioners prevail, the Bankruptcy Court must have jurisdiction over the Government in order to make any award.

Also, it is necessary that the Supreme Court issue this order so that the Government, if ordered to be a party by the Bankruptcy Court on its own, would not be able to claim lack of jurisdiction on some other ground. By granting this petition for mandamus, the Supreme Court will be ruling that the Bankruptcy Court has jurisdiction to hear a takings claim and make an award against the Government. The Supreme Court is the only court in which petitioners may get the relief they seek – an order that the United States be made a party to their bankruptcy cases for the purpose of hearing a takings claim. This would aid the Supreme Court's appellate jurisdiction because any appeal from the Bankruptcy Court's takings ruling would be on the merits as opposed to on jurisdiction as with the Court of Federal Claims and Federal Circuit rulings.

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

WILLIAM T. BARRANTE
P.O. Box 273
Watertown, CT 06795
(860) 379-9885
Attorney for Petitioners

APPENDIX A

United States Court of Appeals for the Federal Circuit

00-5112

BEN W. ALLUSTIARTE, BENJAMIN ALLUSTIARTE, GAYLE ALLUSTIARTE, LINDA A. ALLUSTIARTE, WILLIAM J. CONNOLLY, RUTH F. HOWARD, JAMES D. HUFFER, KARIN HUFFER, JOHN L. JOHNSTON, RAJ KUMAR, CHARLES G. MILDEN, SUSAN P. MILDEN, MARIANNE A. PACK, FRANCES PALMER, ROBERT PALMER, and WESTERN INVESTORS GROUP, INC.,

Plaintiffs-Appellants

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: July 16, 2001

Before CLEVENGER, SCHALL, and GAJARSA, Circuit Judges.

SCHALL, Circuit Judge.

This is an appeal from the decision of the United States Court of Federal Claims that dismissed appellants' complaint against the United States for lack of subject matter jurisdiction. *Allustiarte v. United States*, 46 Fed. Cl. 713 (2000). The court determined that it did not have jurisdiction to consider appellants' allegations "that the actions approved by the bankruptcy courts [of the Ninth Circuit] resulted in takings . . . in violation of the Fifth Amendment to the Constitution." *Id.* at 716. Because the

Court of Federal Claims does not have jurisdiction to review decisions of federal bankruptcy courts, we affirm.

BACKGROUND

Appellants were involved in bankruptcy proceedings in bankruptcy courts in the Ninth Circuit. Appellants sued the United States in the Court of Federal Claims, asserting in their complaint that the "improprieties in certain actions of the Bankruptcy Courts in the Ninth Circuit. . . . constituted a taking without just compensation in violation of the Fifth Amendment to the United States Constitution." Appellants Ben W. Allustiarte, Linda M. Allustiarte, William J. Connolly, Ruth F. Howard, James D. Huffer, Karin Huffer, John L. Johnston, Raj Kumar, Charles G. Milden, Susan P. Milden, and Western Investors Group, Inc. were debtors who filed for bankruptcy. These appellants allege that court-appointed bankruptcy trustees sold their assets for less than they were worth or otherwise handled their property in a manner that diminished their estates. Appellants Benjamin Allustiarte, Gayle Allustiarte, and Marianne A. Pack allege that a bankruptcy trustee wrongfully included their property in the bankruptcy estates of Ben W. Allustiarte and Linda M. Allustiarte. Appellants Robert Palmer and Frances Palmer are creditors who allege in one count that a court-appointed bankruptcy trustee awarded their interest in a bankruptcy debtor's property to another party, and who allege in another count that a bankruptcy trustee awarded them too little in their action against a bankruptcy debtor. Appellants assert that the losses they suffered as a result of the bankruptcy courts' approval of the actions of the bankruptcy trustees constitute takings for which they are entitled to just compensation.

The government moved the Court of Federal Claims to dismiss appellants' complaint for lack of subject matter jurisdiction. In granting the government's motion, the court noted that it could find no precedent "in which the discretionary actions of a Bankruptcy Court judge [were found to] constitute a taking under the Fifth Amendment." *Allustiarte,* 46 Fed. Cl. at 716. Appellants had cited *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935), *United States v. Security Industrial Bank,* 459 U.S. 70 (1982), and *Shanghai Power Co. v. United States,* 4 Cl. Ct. 237 (1983), *aff'd,* 765 F.2d 159 (Fed. Cir. 1985) (unpublished table decision), to support their position. However, the court determined that while those cases acknowledged that amendments to the bankruptcy laws, if retroactive in nature, "could violate the Takings Clause of the Fifth Amendment," they did not "support [appellants'] theory that the discretionary actions of a bankruptcy judge can result in a . . . taking." *Id.* at 717-18.

The court also recognized that it "does not have jurisdiction to review decisions issued during the normal course of bankruptcy proceedings." *Id.* at 718. Instead, "[r]elief from [such] judgments may be found in timely appeals to the appropriate federal district courts, Circuit Courts of Appeal and ultimately to apply for certiorari to the United States Supreme Court." *Id.* The court therefore dismissed appellants' complaint for lack of jurisdiction. Our jurisdiction over the appeal of the dismissal is provided by 28 U.S.C. § 1295(a)(3) (1994).

DISCUSSION

The subject matter jurisdiction of the Court of Federal Claims is a question of law that we review *de novo. First*

Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279, 1286-87 (Fed. Cir. 1999). The court here correctly determined that it lacks jurisdiction over appellants' challenges to the actions of the Ninth Circuit bankruptcy courts.

Each appellant's takings claim is based on an allegedly improper action by a bankruptcy trustee that was approved by a Ninth Circuit bankruptcy court. Appellants admit that the judgments of the bankruptcy courts were authorized by the applicable bankruptcy laws. They contend that they are not asking the Court of Federal Claims to review those judgments. However, in order for the court to entertain appellants' takings claims, it would have to determine whether appellants suffered a categorical taking of their property at the hands of the bankruptcy trustees and courts, or whether the courts' and trustees' actions defeated their reasonable, investment-backed expectations. *See, e.g., Rith Energy, Inc. v. United States,* 247 F.3d 1355, 1362 (Fed. Cir. 2001) (explaining that a regulatory scheme may effect one of two types of takings: a categorical taking that deprives the property owner of all economically viable use of the property, or a non-categorical taking that defeats the property owner's reasonable, investment-backed expectations). Such a determination would require the court to scrutinize the actions of the bankruptcy trustees and courts.

As we stated in *Joshua v. United States,* 17 F.3d 378, 380 (Fed. Cir. 1994), "the Court of Federal Claims does not have jurisdiction to review the decisions of district courts." Moreover, the Supreme Court has stated that if a party is "dissatisfied with the Bankruptcy Court's ultimate decision, [it] can appeal 'to the district court for the judicial district in which the bankruptcy judge is serving,' and

then to the Court of Appeals." *Celotex Corp. v. Edwards,* 514 U.S. 300, 313 (1995) (quoting 28 U.S.C. § 158(a) and citing 28 U.S.C. § 158(d)) (internal citations omitted). To permit collateral attacks on bankruptcy court judgments would "seriously undercut[ ] the orderly process of the law." *Id.* The proper forum for appellants' challenges to the bankruptcy trustees' actions therefore lies in the Ninth Circuit, not the Court of Federal Claims.[1]

Appellants cite *Preseault v. Interstate Commerce Commission,* 494 U.S. 1 (1990), for the proposition that the availability of appellate review in the Ninth Circuit does not preclude their ability to bring a takings claim in the Court of Federal Claims. The petitioners in *Preseault* had challenged the constitutionality of a statute, alleging that it effected a taking of their property. *Id.* at 10. The Second Circuit denied their challenge, and the Supreme Court affirmed that decision. *Id.* The Supreme Court determined, however, that the petitioners could bring suit in the United States Claims Court (the predecessor to the Court of Federal Claims) to seek compensation for the alleged taking. *Id.* at 11-17. The petitioners did so and, in due course, this court determined that they had suffered a taking for which they were entitled to just compensation. *Preseault v. United States,* 100 F.3d 1525, 1552 (Fed. Cir. 1996).

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[1] Some appellants here did pursue judicial review in the Ninth Circuit. *See, e.g., In re Allustiarte,* 786 F.2d 910 (9th Cir. 1986); *In re Allustiarte,* 884 F.2d 1394 (9th Cir. 1989) (unpublished table decision); *In re Connolly,* 141 F.3d 1174 (9th Cir. 1998) (unpublished table decision); *Johnston v. Jem Devel. Co.,* 149 B.R. 158 (B.A.P. 9th Cir.1992); *In re Milden,* 111 F.3d 138 (9th Cir. 1997) (unpublished table decision).

Appellants analogize their situation to that of the petitioners in *Preseault*: Like the Preseaults, who pursued an appeal to the Second Circuit, appellants availed themselves of the judicial review available in the Ninth Circuit, and, like the Preseaults, who were permitted to subsequently pursue a takings claim in the Court of Federal Claims, appellants now seek to pursue their takings claims in the Court of Federal Claims. The claims litigated in *Preseault*, however, are quite distinct from appellants' claims. First, the Preseaults' Second Circuit appeal challenged the constitutionality of a statute under the Takings Clause of the Fifth Amendment; appellants' Ninth Circuit proceedings challenged the actions of the bankruptcy trustees under the bankruptcy laws. Second, the Preseaults' takings claim in the Court of Federal Claims was based on the operation of the statute whose constitutionality they had unsuccessfully challenged in the Second Circuit and the Supreme Court; appellants' takings claims are based on the bankruptcy courts' approval of the actions of the bankruptcy trustees. Nothing in *Preseault* suggests that appellants can bring such takings claims in the Court of Federal Claims.

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims dismissing appellants' complaint for lack of subject matter jurisdiction is

AFFIRMED.

APPENDIX B

In the United States Court of Federal Claims

No. 99-1010L
FILED: May 24, 2000

BEN W. ALLUSTIARTE, et al.,	*	
Plaintiffs,	*	**Jurisdiction; Motion to Dismiss; Bankruptcy Court Decisions.**
v.	*	
UNITED STATES,	*	
Defendant.	*	

WILLIAM T. BARRANTE, Watertown, CT, attorney of record for the plaintiffs.

SUSAN V. COOK, General Litigation Section, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C., attorney of record for the defendant.

OPINION

HORN, J.

FINDINGS OF FACT

The plaintiffs, Ben W. Allustiarte, et al., filed a complaint and request for damages with this court on December 22, 1999. For the purposes of this motion, the facts are not in dispute. Plaintiffs state, "In each of the counts the action of the bankruptcy Judge was 'authorized,' that is,

the judges acted within their statutory powers under the bankruptcy statutes."

The complaint contains ten counts from multiple plaintiffs who allege that the rulings issued by the bankruptcy courts involved in their respective proceedings were improper and caused them significant losses. Plaintiffs contend that the actions of the bankruptcy courts constitute a taking of plaintiffs' property without just compensation, in violation of the Fifth Amendment to the United States Constitution. Plaintiffs also allege that because of defendant's failure to pay just compensation to the plaintiffs, the orders, decrees and judgments of the bankruptcy courts should be considered "void judgments within the meaning of Rule 60(b)(4) of the Federal Rules of Civil Procedure, as adopted by the United States Court of Federal Claims."

In the words of count 1 of the complaint, "Ben W. Allustiarte and Linda M. Allustiarte filed a petition for a real estate arrangement as farmers under Chapter XII of the Bankruptcy Act of 1898" on August 15, 1979. They allege that the bankruptcy trustee sold plaintiffs' real estate at prices below its fair market value, resulting in a net loss of $24,014,194.00.

In count 2, Benjamin A., Gregory and Gayle Allustiarte, along with Marianne A. Pack, allege that two pieces of real estate held jointly between them were wrongfully included in the bankruptcy estates of Ben W. and Linda Allustiarte. Plaintiffs in count 2 claim damages in the amount of $5,196,197.68.

Plaintiff in count 3, William J. Connolly, filed for bankruptcy in February 1988 under Chapter 11 of the Bankruptcy Code. Plaintiff alleges that the court appointed

trustee wrongfully devastated his estate, failed to satisfy IRS claims against plaintiff, and failed to account for income earned by the estate from oil leases. Plaintiff Connolly claims damages in the amount of $4,905,255.25.

In count 4, plaintiff, Ruth F. Howard, filed for relief under Chapter 11 of the Bankruptcy Code in July of 1988. Plaintiff claims that she lost $273,000.00 due to the administration of her estate by the court approved bankruptcy trustee.

Plaintiffs in count 5, James D. and Karin Huffer, and Western Investors Group, Inc., which is wholly owned by plaintiffs James D. and Karin Huffer, filed for relief under Chapter 11 of the Bankruptcy Code in 1984. Plaintiffs allege that the bankruptcy trustee devastated their estate by allowing creditors to foreclose on certain pieces of property owned by plaintiffs in actions approved by the Bankruptcy Court. Plaintiffs claim damages in the amount of $1,575,000.00.

In count 6, plaintiff, John L. Johnston, filed for relief in the Bankruptcy Court on April 23, 1990. Plaintiff claims that the court appointed trustee improperly devastated plaintiff's estate in various respects, resulting in a loss of $945,789.32 to plaintiff.

In count 7, plaintiff, Raj Kumar, filed for relief under the Bankruptcy Code in September 1986. Plaintiff complains that the Bankruptcy Court approved the sale of his property to a neighbor and business competitor, despite plaintiff's objections. Plaintiff claims he opposed the sale because of bona fide offers significantly exceeding the offer from his neighbor. Plaintiff claims $1,000,000.00 in damages.

In count 8, plaintiffs, Charles G. and Susan P. Milden, filed for relief under Chapter 11 of the Bankruptcy Code in October 1991. Plaintiffs claim that the court abandoned portions of plaintiffs' property allowing an allegedly undervalued sale. According to the plaintiffs, the trustee settled a lawsuit in which plaintiffs were litigants for less than it was worth. The settlement was approved by the Bankruptcy Court in September of 1993, and in November of 1999, the court approved the trustee's final report. Plaintiffs claim damages in the amount of $55,857,961.20.

Counts 9 and 10 consist of claims from the only creditor-plaintiffs in the lawsuit, Robert and Frances Palmer. Plaintiffs allege that the Bankruptcy Court and its trustee improperly awarded plaintiffs' interests in a debtor's property, precluding plaintiffs from recovering all that they should have received. Count 9 requests damages in the amount of $73,000.00, while count 10 requests damages in the amount of $35,000.00.

DISCUSSION

The defendant has filed a motion to dismiss pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC) for lack of subject matter jurisdiction. Subject matter jurisdiction may be challenged at any time by the parties, by the court *sua sponte,* or on appeal. *Booth v. United States,* 990 F.2d 617, 620 (Fed. Cir. 1993), *reh'g denied* (1993); *United States v. Newport News Shipbuilding & Dry Dock Co.,* 933 F.2d 996, 998 n.1 (Fed. Cir. 1991). Once jurisdiction is challenged by the court or the opposing party, the plaintiff bears the burden of establishing jurisdiction. *McNutt v. General Motors Acceptance Corp. of Indiana,* 298 U.S. 178, 189, 56 S. Ct. 780, 80 L.

Ed. 1135 (1936). A plaintiff must establish jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Alaska v. United States*, 32 Fed. Cl. 689, 695 (1995), *appeal dismissed*, 86 F.3d 1178 (Fed. Cir. 1996). When construing the pleadings pursuant to a motion to dismiss, the court should not grant the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Son Broadcasting, Inc. v. United States*, 42 Fed. Cl. 532, 537 (1998) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (footnote omitted)).

Pursuant to RCFC 8(a)(1) and the Federal Rules of Civil Procedure 8(a)(1), a plaintiff need only state in the complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends." However, "[d]etermination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997), *reh'g denied* (1997). *Pro se* plaintiffs can be held to less stringent standards than formal pleadings drafted by lawyers. *Boyle v. United States*, 44 Fed. Cl. 60 (1999) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652, *reh'g denied*, 405 U.S. 948, 92 S. Ct. 963, 30 L. Ed. 2d 819 (1972)), *aff'd*, 200 F.3d 1369 (Fed. Cir. 2000). Nonetheless, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 787 (1983).

When deciding on a motion to dismiss based on either lack of subject matter jurisdiction or failure to state a

claim, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the plaintiff's favor. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *see also Henke v. United States,* 60 F.3d 795, 797 (Fed. Cir. 1995); *Hamlet v. United States,* 873 F.2d 1414, 1416 (Fed. Cir. 1989). If a defendant challenges jurisdiction or plaintiff's claim for relief, however, the plaintiff cannot rely merely on allegations in the complaint but must instead bring forth relevant, competent proof to establish jurisdiction. *McNutt v. General Motors Acceptance Corp. of Indiana,* 298 U.S. at 189; *see also Land v. Dollar,* 330 U.S. 731, 735, 67 S. Ct. 1009, 91 L. Ed. 1209 (1947); *Reynolds v. Army & Air Force Exch. Serv.,* 846 F.2d at 747; *Catellus Development Corp. v. United States,* 31 Fed. Cl. 399, 404-05 (1994). The court may consider all relevant evidence in order to resolve the factual dispute, including evidentiary matters outside the pleadings. *Indium Corp. of America v. Semi-Alloys, Inc.,* 781 F.2d 879, 884 (Fed. Cir. 1985), *cert. denied,* 479 U.S. 820, 107 S. Ct. 84, 93 L. Ed. 2d 37 (1986).

In order for this court to have jurisdiction over a plaintiff's complaint, the Tucker Act requires that the plaintiff identify an independent substantive right enforceable against the United States for money damages. 28 U.S.C.A. § 1491 (West 1994 & Supp.1998). The Tucker Act states:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the

> United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C.A. § 1491(a)(1). As interpreted by the United States Supreme Court, this Act waives sovereign immunity to allow jurisdiction over claims (1) founded on an express or implied contract with the United States; (2) for a refund from a prior payment made to the government; or (3) based on federal constitutional, statutory, or regulatory law. *United States v. Testan,* 424 U.S. 392, 400, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976) (quoting *Eastport S.S. Corp. v. United States,* 178 Ct. Cl. 599, 605-06, 372 F.2d 1002, 1009 (1967)); *see also Palmer v. United States,* 168 F.3d 1310, 1314 (Fed. Cir. 1999); *Stinson, Lyons & Bustamante, P.A. v. United States,* 33 Fed. Cl. 474, 478 (1995), *aff'd,* 79 F.3d 136 (Fed. Cir. 1996). A waiver of traditional sovereign immunity "cannot be implied but must be unequivocally expressed." *Saraco v. United States,* 61 F.3d 863, 864 (Fed. Cir. 1995) (quoting *United States v. King,* 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969)), *cert. denied,* 517 U.S. 1166, 116 S. Ct. 1565, 134 L. Ed. 2d 665 (1996).

The Tucker Act, however, merely confers jurisdiction on the United States Court of Federal Claims, "it does not create any substantive right enforceable against the United States for money damages." *United States v. Mitchell,* 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (quoting *United States v. Testan,* 424 U.S. at 398-99), *reh'g denied,* 446 U.S. 992, 100 S. Ct. 2979, 64 L. Ed. 2d 849 (1980); *see also Saraco v. United States,* 61 F.3d at 865 (citing *Zumerling v. Devine,* 769 F.2d 745, 749 (Fed. Cir. 1985)) (citing *United States v. Testan,* 424 U.S. at 398); *see also United States v. Connolly,* 716 F.2d 882, 885 (Fed. Cir. 1983) (en banc), *cert. denied,* 465 U.S. 1065, 104 S. Ct. 1414, 79 L. Ed. 2d 740 (1984). Individual claimants, therefore,

must look beyond the jurisdictional statute for a waiver of sovereign immunity. *United States v. Mitchell,* 445 U.S. at 538. For claims founded on a statute or regulation to be successful, "the provisions relied upon must contain language which could fairly be interpreted as mandating recovery of compensation from the government." *United States v. Testan,* 424 U.S. at 400 (quoting *Eastport S.S. Corp. v. United States,* 178 Ct. Cl. at 607, 372 F.2d at 1009 (1967)); *see also Doe v. United States,* 100 F.3d 1576, 1579 (Fed. Cir. 1996), *reh'g denied* (1997).

The plaintiffs in the instant case allege that the actions approved by the bankruptcy courts resulted in takings by the defendant in violation of the Fifth Amendment to the Constitution and that defendant's failure to pay just compensation render the bankruptcy court actions void. As stated by the plaintiffs in their brief on jurisdiction:

> In the present case, the plaintiffs are not seeking to avoid, defeat, or evade any judgment of a bankruptcy court, or to deny any such judgment any effect. They do not seek relief **against any judgment**. They seek compensation as a result of the judgments. And because the Bankruptcy Court does not have the power or authority to order the Government to pay compensation as a result of a Fifth Amendment taking, the plaintiffs would have wasted both time and money if they had even asked the Bankruptcy Court in each respective case to consider that issue.
>
> Plaintiffs do not question the validity of the bankruptcy rulings per se. They claim that the

> rulings are wrong only if just compensation does not follow.

(Emphasis in original.)

Plaintiffs fail to cite any precedent, nor could this court find any reported cases, in which the discretionary actions of a Bankruptcy Court judge constitute a taking under the Fifth Amendment. Moreover, plaintiffs state in their brief:

> This is an admittedly novel application of the Takings Clause. If the court is looking for a precedent on point, the court will not find it. But that does not mean that the plaintiffs do not have a good cause of action. I believe we are on good ground in this matter. The trend in recent years has been to expand, not contract, the purview of Fifth Amendment takings claims.

In an attempt to demonstrate that a takings requiring compensation can result from decisions issued by the judicial branch, plaintiffs rely, by way of analogy, on two United States Supreme Court cases, and a case in the United States Claims Court, a predecessor to this court, which was affirmed by the United States Court of Appeals for the Federal Circuit and on which certiorari was denied. Contrary to plaintiffs assertions, however, none of these cases supports plaintiffs' argument that the actions of the bankruptcy judges who issued the decisions referred to in the various counts included in plaintiffs' complaint resulted in a constitutional taking.

In *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 573, 578 (1935), the creditor-plaintiff attacked the constitutionality of a statute, ("the Frazier-Lemke Act, June 28, 1934, c. 869, 48 Stat. 1289, 11 USCA § 203(s)"),

which added a section to the Bankruptcy Act on the grounds that the Act violated the Takings Clause of the Fifth Amendment. Plaintiff in that case argued that the Act allowed the bankrupt entity to stall foreclosure proceedings and remain in possession of their mortgaged property, to the detriment of the plaintiff-creditor. The Supreme Court acknowledged that "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment," while also noting that "[u]nder the bankruptcy power Congress may discharge the debtor's personal obligation, because . . . it is not prohibited from impairing the obligations of contracts." *Id.* at 589 (citations omitted). The Supreme Court noted that there had been instances in the past when "[s]tatutes for the relief of mortgagors, when applied to pre-existing mortgages, have given rise, from time to time, to serious constitutional questions." *Id.* at 581. Based on the issues presented, the Court found that the Frazier-Lemke Act, did constitute a taking of the "substantive rights in specific property acquired by the bank prior to the act." *Id.* at 590. The Supreme Court's opinion in *Louisville Joint Stock Land Bank v. Radford,* however, does not provide any support for plaintiffs' claims. The case stands for the principle that the actions of Congress can result in a Fifth Amendment taking, not for the concept that a taking can occur as the result of the authorized actions of a judicial officer.

Plaintiffs also cite and seek to rely on *United States v. Security Industrial Bank,* 459 U.S. 70 (1982), which similarly involved creditors who were seeking just compensation due to the impact of the enactment of a statute, in this case 11 U.S.C. § 522(f)(2), as part of the Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 92 Stat.

2549, on liens perfected before the Act was passed. The question presented was whether the statute invalidated liens acquired before the enactment date. *Id.* at 71. Again, the Supreme Court acknowledged that under Article 1, Section 8, Clause 4 of the Constitution, it is within the rational exercise of the authority of Congress to retrospectively impair contractual obligations. *Id.* at 74. The Court also agreed with the sentiment expressed in *Louisville Joint Stock Land Bank v. Radford* that if retroactive in nature, the statute could violate the Takings Clause of the Fifth Amendment to the Constitution because it would result in a taking of the creditor's interest held prior to the statute's enactment. *Id.* at 76-78. Because the Court did not find that the statute was intended to apply to prior established liens, it affirmed the Bankruptcy Court decisions at issue. *Id.* at 82. Once again, the decision cited by the above captioned plaintiffs does not support their theory that the discretionary actions of a bankruptcy judge can result in a constitutional taking of either creditors' or debtors' property.

In addition, plaintiffs try to rely on the Federal Circuit's decision in *Shanghai Power Company v. United States,* 4 Cl. Ct. 237 (1983), *aff'd,* 765 F.2d 159 (Fed. Cir. 1985) (Table), *cert. denied,* 474 U.S. 909 (1985). In this case, the plaintiff contended that the President's settlement of their claim against China, without the plaintiff's consent and allegedly for a value disproportionate to its real value, entitled the plaintiffs to just compensation under the Fifth Amendment. As part of its analysis, the Federal Circuit suggested a similarity between the role of the President in settling foreign disputes to the power of Congress in drafting the statutory framework through which bankruptcy disputes are settled. *Id.* at

246. Specifically, referencing the congressional acts in *Louisville Joint Stock Land Bank v. Radford* and *United States v. Security Industrial Bank,* the Federal Circuit declared that: "Of course, when the bankruptcy power is exercised in a wholly novel and unexpected manner, frustrating the legitimate expectations of creditors, it may amount to an unconstitutional taking." *Shanghai Power Co. v. United States,* 4 Cl.Ct. at 247. However, the Court further pointed out:

> In light of these important policy considerations, a creditor cannot argue that bankruptcy proceedings are unlawful because he could have collected more had he been permitted to pursue other remedies. . . . Nor will a creditor be allowed to claim a taking because the debt has been discharged even though the debtor may eventually be able to pay off the full amount.

Id. at 246-47 (citation omitted).

As explained above, the United States Supreme Court has concluded that an act of Congress that invalidates prior established rights, such as liens or mortgages, could be considered novel or unexpected and, therefore, could constitute a taking for which just compensation must be provided. These cases, however, still do not provide support for plaintiffs' proposition that authorized, discretionary decisions issued by an authorized member of the judiciary can amount to a taking.

Plaintiffs offer an additional theory that because of defendant's failure to pay just compensation to the plaintiffs, the bankruptcy courts' decisions were "void" within the meaning of RCFC 60(b)(4). RCFC 60(b) provides: "On motion and upon such terms as are just, the court may

relieve a party or the party's legal representative from a final judgment, order, or preceding [sic] for the following reasons: . . . (4) the judgment is void." However, as the defendant points out, this court "lacks jurisdiction to entertain a Tucker Act claim under Rule 60(b) against the decisions of other courts." This trial court is not empowered to act as an appellate body with respect to the decisions of other courts. Plaintiffs' available course of relief was individually to seek review and appeal the decisions of the bankruptcy judges, which, according to the record, each of the plaintiffs, apparently, failed to do. Plaintiffs cannot circumvent the traditional review and appeals process simply by making a constitutional claim. The Supreme Court in *Celotex Corporation v. Edwards,* 514 U.S. 300 (1995), outlined the correct, "orderly" way to appeal bankruptcy decisions: "If dissatisfied with the Bankruptcy Court's ultimate decision, respondents can appeal 'to the district court for the judicial district in which the bankruptcy judge is serving,' . . . and then to the Court of Appeals for the . . . Circuit." *Id.* at 313 (quoting 28 U.S.C. § 158(a)); *see also* 28 U.S.C. § 158(d).

CONCLUSION

While plaintiffs' claim may be creative, it is not supported by the procedures applicable to disputing decisions of federal bankruptcy court judges. Claims under the Fifth Amendment were not fashioned to function as an appellate process for bankruptcy court proceedings and cannot support a taking in the context suggested by the plaintiffs. The Court of Federal Claims does not have jurisdiction to review decisions issued during the normal course of bankruptcy proceedings. Relief from these

judgments may be found in timely appeals to the appropriate federal district courts, Circuit Courts of Appeal and ultimately to apply for certiorari to the United States Supreme Court.

IT IS SO ORDERED.

/s/ Marian Blank Horn
MARIAN BLANK HORN
Judge